



[2022] JMSC Civ.84

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. 2012 HCV 06896**

<b>BETWEEN</b>	<b>DANIEL THOMPSON</b> <b>(A minor who sues by his Father and</b> <b>Next friend, Desmond Thompson)</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>SEAN STEWART</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>WINCHESTER WATSON</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**CONSOLIDATED WITH:**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. 2012 HCV06892**

<b>BETWEEN</b>	<b>YANIQUE THOMPSON</b> <b>(A minor who sues by her Father and</b> <b>Next friend, Desmond Thompson)</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>SEAN STEWART</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>WINCHESTER WATSON</b>	<b>2<sup>ND</sup> DEFENDANT</b>

Mr. Akheme Harris instructed by Kinghorn & Kinghorn Attorneys at Law for the Claimant

Ms. Althea Wilkins instructed by Dunbar & Co. for the Defendant

Negligence – Contributory Negligence

Heard: May 11 and 12, 2022 and June 17<sup>th</sup> 2022

Carr, J

## **Background**

- [1] The Claimants were both children at the time of the filing of this claim. They sought, by way of next friend, relief in damages due to the negligence of the 1<sup>st</sup> Defendant, who they say operated his motor vehicle without due care and control on the 19<sup>th</sup> of November 2011. They are now no longer minors and the next friend certificate was discontinued.
- [2] They contend that while in the company of their father, they were walking along Braeton Park Way in Portmore St. Catherine sometime after 6 that evening. They stopped along the road and waited until it was safe to cross. While crossing, the motor vehicle being driven by the 1<sup>st</sup> Defendant collided with them. As a result, they both sustained injuries. They were transported to the hospital where they received treatment.
- [3] The 2<sup>nd</sup> Defendant is the owner of the vehicle. He has not denied that at the time of the collision the 1<sup>st</sup> Defendant was his servant and/or agent. The 1<sup>st</sup> Defendant (Sean Stewart) was never served in this matter, but he provided a witness statement on behalf of the 2<sup>nd</sup> Defendant.

## **Issues**

- [4] Whether the 1<sup>st</sup> Defendant's actions caused the collision.
- [5] Were the Claimants contributorily negligent.

## **The Law**

- [6] It is settled law that in order to establish the tort of negligence the Claimants must prove on a balance of probabilities that the 1<sup>st</sup> Defendant owed them a duty of care, that there was a breach of that duty, and as a result they suffered injury.
- [7] It is also an established principle of law that there is a duty on all users of a road way to take reasonable care to ensure the safety of fellow road users. In this case the 2<sup>nd</sup> Defendant has raised the issue of contributory negligence. In the event that

the evidence supports a conclusion that the Claimants were partly or wholly responsible for the collision, then by operation of statute any award in damages would be reduced in accordance with the proportion of liability assessed by the court<sup>1</sup>.

### **Submissions**

[8] In closing submissions to the court, Counsel on behalf of the Claimants and the Defendants conceded that a determination as to liability would turn on the evidence of the witnesses. Counsel for the Claimant urged the court to find that the 1<sup>st</sup> Defendant was aggressive and reluctant to answer questions. He also asked the court to reject his evidence and to find in favour of the Claimants.

[9] Counsel for the 2<sup>nd</sup> Defendant argued that the children were of tender years at the time of the collision. She submitted that their father would have been in a better position to give evidence on their behalf however there was no statement from him. Counsel also pointed to the inconsistencies between the medical reports admitted into evidence and the testimony of the witnesses as to their injuries. Further she asked the court to take note of the discrepancies between the testimony of the two Claimants. In summary she submitted that the evidence on behalf of the Claimants was not credible and ought not to be accepted by this court.

### **Evidence**

[10] Daniel Thompson provided a witness statement that was filed on the 14<sup>th</sup> of December 2021. His sister Yanique Thompson gave her statement on the 6<sup>th</sup> of January 2022, it was dated the 31<sup>st</sup> of December 2021. It is fair to say that the evidence of the children, who are now adults, was presented some eleven years after the collision. The length of time between the date of the incident and the filing of the witness statements cannot go unnoticed. The events on that distant evening

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<sup>1</sup> The Law Reform (Contributory Negligence) Act

would no doubt have been traumatic for the two minors and would affect their ability to adequately recall the details of the collision.

- [11] I will make reference to the Claimants by their first names, and no disrespect is intended. Yanique was 13, and her brother Daniel was 8 years old on the date of the collision. They left their home which was a short distance away at Silverstone with the intention of going to the supermarket. In order to get to the supermarket, they had to cross the Braeton Parkway. They were accompanied by their father. Daniel says that his father was holding their hands while they were crossing. Yanique says that he was not holding their hands as she was first to cross followed by her brother and then her father. She agreed that her father, as the responsible adult with two children, should have taken care to ensure that they were able to cross the road safely.
- [12] She looked up and down the road and she saw a motor vehicle that stopped to allow the family to cross, she also observed a taxi which had stopped some distance from the entrance to the plaza across the road. She looked left and right again and considered that it was safe to cross and made her way. She then saw the glare of headlights and she lost consciousness. Her brother said he observed the car that stopped to allow them to cross and he also saw the taxi on the opposite side of the road. The taxi drove off at a fast speed while they were crossing and collided with himself, his sister and his father.
- [13] Mr. Stewart said that he stopped close to the exit of the plaza to allow two motor vehicles to enter onto the Parkway. Both vehicles exited and turned right in the direction that he was coming from. As he released his brake and moved off slightly he felt an impact to the front right fender of the car. He glimpsed a man pulling two children out of the road. He got out of the vehicle and quarrelled with the man who he saw with the children. He did not observe the children with any injuries, however after being prodded by persons in the area, he took them to the hospital.

## **Analysis and Discussion**

**[14]** The evidence of Yanique and Daniel differ on several points:

- a) Yanique said her father was not holding her hand at the time of crossing. Daniel said that he was.
- b) Yanique said that the driver of the taxi was not on the left side of the road after the accident but that he was in the right lane, Daniel said the driver was in the left lane.
- c) Yanique said that she was the person who received the brunt of the impact, Daniel said the vehicle collided with himself, his sister and his father. He also said that his leg ended up beneath the car giving the impression that he was closer to the car than his sister.
- d) Yanique said that the impact with the vehicle was to the middle of the front bumper, Daniel said it was to the right side of the vehicle.
- e) Yanique said that they had not completed crossing the road, Daniel said that they had crossed over to the other side.

**[15]** I find that the evidence of the children as to the cause of the collision is unreliable. The conclusion that Mr. Stewart was driving at a fast speed is not supported by the minor injuries that formed a part of the medical evidence.

**[16]** The medical reports of Dr Ijah Thompson were admitted in evidence as Exhibits 1 and 2. The Doctor saw Daniel on the 28<sup>th</sup> of November 2011. Daniel complained of the following:

- a) bruises to his left elbow
- b) pain to his right knee
- c) pain score was reported as 4 out of 10.

**[17]** He was diagnosed with soft tissue injuries to his left elbow and right knee. He was treated with analgesics and muscle relaxants and was sent home.

**[18]** Yanique was seen by Dr. Thompson on the 30<sup>th</sup> of November 2011. She complained of the following:

- a) difficulty sitting on her bottom
- b) pain to her right thigh
- c) headache
- d) pain score 4 of 10
- e) activities of daily living – mild impaired.

**[19]** She was assessed as having soft tissue injury to her buttock, contusion to the right medial proximal leg and post traumatic headache. She too was treated with analgesics and muscle relaxants and released. There were no follow up medical reports exhibited.

**[20]** The injuries outlined by the Doctor are not considered serious. In fact, it is fair to say, that based on the evidence both children were not the victims of a serious collision. The description given by Daniel of a speeding car coming from some distance away does not accord with the medical evidence. I find that the collision was a minor one as described by the 1<sup>st</sup> Defendant.

**[21]** The version outlined by the 1<sup>st</sup> Defendant however clearly shows that he was not as focused as he should have been when he moved off. I find, that because he was focused on allowing the two vehicles to exit the plaza, he was not aware of the children as they crossed the road. I reject his evidence that they ran into the vehicle as he moved off. Had he been paying attention he should have observed them as they were coming across the road, since he was able to say that the vehicles exited the plaza to go in the opposite direction from where he was coming from. Further, I do not accept that the children were able to cross the road and avoid a collision with those two vehicles and yet collide with the vehicle being driven by the 1<sup>st</sup> Defendant.

**[22]** I also find and accept that the father of the children was negligent in allowing them to cross without holding their hand and without ensuring that it was safe to do so.

The taxi being driven by the 1<sup>st</sup> Defendant was on the road at some distance away according to Yanique and Daniel. They saw the motor vehicle stopped and passengers exiting. It was the duty of Mr. Thompson to ensure that all vehicles on the road way had cleared before attempting to cross the road with his children. I find as a fact that his actions contributed to the collision and I have assessed the liability at 50%. Any award in damages will have to be reduced by that amount.

### **Special Damages**

#### **Yanique Thompson**

[23] The claim for special damages was in the amount of \$58,000.00. The breakdown is as follows:

- a) Medical expenses: \$53,000
- b) Transportation: \$5,000

[24] Counsel for the Defendant did not object to the receipts for the medical visit and the medical report which totalled \$35,000.00. However, she argued that there was no evidence that Yanique required a CT Brain scan. It was submitted that the court should disregard this receipt as there was no nexus between the injuries outlined by the doctor and the need for a CT Brain scan. I agree with counsel. Based on the injuries received there was no medical basis to have a CT Brain scan performed over a year after the collision. There was also no evidence or receipt in proof of the claim for transportation.

[25] The total award for special damages is therefore \$35,000 when reduced by 50% the amount is \$17,500.00.

#### **Daniel Thompson**

[26] The claim for special damages was in the amount of \$58,000.00. The breakdown is as follows:

- a) Medical expenses: \$53,000

b) Transportation: \$5,000

[27] The receipts which were admitted as Exhibits 7(a) and (b) total \$35,000.00 and represent the cost for a medical visit and the preparation of the medical report. There was no receipt or evidence in proof of the claim for transportation. The award when reduced by 50% amounts to \$17,500.00.

### **General Damages**

[28] Counsel for the Claimant rested his submissions on a single case on behalf of both Claimants. He referred the court to the authority of **Hermina Harvey v. Amy Rigabie**.<sup>2</sup> An award of \$240,000 was made in that case in December 2003, updated using the current CPI he submitted that an award of \$1,021,908.13 should be made.

[29] Counsel for the Defendant submitted that the injuries suffered by the Claimant in the Harvey matter were far more serious than those suffered by the Claimants in the instant case. She referred the court to the matter of **Eric Ward v. Lester Barcoo**<sup>3</sup> and **Reginald Stephens v. James Bonfield**<sup>4</sup>.

[30] In the case of Harvey her injuries were described as follows:

- a) pain and tenderness to the right side of the body.
- b) tenderness to the right shoulder.
- c) diffuse swelling and tenderness with superficial abrasion to the posterior aspect of the right forearm.
- d) mild swelling and tenderness to the right knee.

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<sup>2</sup> Unreported Suit No. C.L.H. 049 of 2001, November 13, and December 2, 2003

<sup>3</sup> Assessment of Damages for Personal Injuries [Revised edition of Casenote No 2] Compiled and edited by Mr. Justice Karl S. Harrison and Marc S. Harrison pg. 206

<sup>4</sup> Khan's Recent Personal Injury Awards Volume 4 pg. 212

- [31] Ms. Harvey on a follow up visit to her doctor was assessed as having tears in the supraspinatus and subscapularis muscles respectively. She also had an anterior cruciate ligament tear and lateral meniscal tear respectively.
- [32] In the case of **Barcoo**, the Claimant suffered blows to the right foot and the right side of his chest resulting in tenderness and pain in the lower back. He was treated at hospital and sent home. An award of \$16,000 for pain and suffering was made in 1991. When updated using the current CPI the award would be \$245,346.83. In the case of **Stephens**, the Claimant suffered an abrasion of left leg, bruise on right foot and experienced pain for about four weeks. He was awarded the sum of \$40,000 for pain and suffering in September 1996. When updated using the current CPI, that award would now be in the sum of \$117,864.07.
- [33] I find that the injuries suffered by the Claimant in the **Harvey** case are far more severe than the injuries suffered by Yanique and Daniel. They both suffered predominantly from soft tissue injury, which is more in line with the injuries in the **Barcoo** case. There was no documentation to indicate that the children returned to a doctor for follow up treatment or physiotherapy. I find as a fact that their injuries resolved sufficiently and they were left with no permanent impairment.
- [34] An award of \$300,000.00 is appropriate for both Claimants. That amount is reduced by half in keeping with the finding of contributory negligence.
- [35] Given the nature of the injuries suffered by the Claimants this is a matter which did not exceed the monetary jurisdiction of the Parish Court. Counsel for the 2<sup>nd</sup> Defendant submitted that in the circumstances costs should be awarded based on the tariff of fees for the Parish Courts. I agree with that submission.

**Order:**

**Yanique Thompson**

1. General Damages is awarded in the sum of \$150,000.00 with interest at the rate of 3% from the 15<sup>th</sup> of January 2013 to the 17<sup>th</sup> of June 2022.

2. Special Damages is awarded in the sum of \$17,500.00 with interest at the rate of 3% from the 19<sup>th</sup> of November 2011 to the 17<sup>th</sup> of June 2022.
3. Costs to the Claimant as per the Parish Court Tariff of Fees.

**Daniel Thompson**

1. General Damages is awarded in the sum of \$150,000.00 with interest at the rate of 3% from the 19<sup>th</sup> of January 2013 to the 17<sup>th</sup> of June 2022.
2. Special Damages is awarded in the sum of \$17,500.00 with interest at the rate of 3% from the 19<sup>th</sup> of November 2011 to the 17<sup>th</sup> of June 2022.
3. Costs to the Claimant as per the Parish Court Tariff of Fees.